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In The
Supreme Court of the United States

KELLY A. AYOTTE,
ATTORNEY GENERAL OF NEW HAMPSHIRE,

Petitioner,

v.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR AMICI CURIAE NEW HAMPSHIRE STATE REP. TERIE NORELLI AND OVER ONE HUNDRED OTHER STATE LEGISLATORS SUPPORTING RESPONDENTS

RUSSELL F. HILLIARD
KENNETH J. BARNES*
UPTON & HATFIELD, LLP
10 Centre St., P.O. Box 1090
Concord, NH 03302-1090
(603) 224-7791

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI

Amici curiae are all legislators in the State of New Hampshire.[1] Some are State Senators and some are State Representatives. They submit this brief in support of Respondents, seeking to affirm the judgment of the United States Court of Appeals for the First Circuit.[2]

During the debate on the New Hampshire Parental Notification Prior to Abortion Act ("the Act" or "PNA"), many of the amici advocated against passage of the bill that became the Act. They stressed the unconstitutionality of the bill and the importance of a medical emergency exception in order to protect the health of young women who might need an abortion. Amici were distressed when several supporters and sponsors of the bill expressed their desire to pass a bill with *no* exception to protect teens' health in medical emergencies. Despite the concerns, raised by amici and others, about the need to protect young women's health, the bill's supporters made clear that they wanted to test whether the courts – especially this Court – would allow such a statute to pass constitutional muster. The bill's supporters insisted on a bill with no exceptions except where the woman would die before the 48-hour waiting period expired.

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[1] A complete list of all 153 amici is attached hereto in the Appendix to this Brief.

[2] Amici submit this brief in support of Respondents. Counsel for all parties consented to amici's filing this brief, and copies of letters so indicating are being filed with this brief. This brief was authored by amici and their counsel; no part of it was authored by any other party. Nor has any party contributed financially to its production.

Amici wish to share their legislative perspective with the Court.[3] First, based on amici's knowledge of the New Hampshire Legislature, amici believe that a majority of the Legislature might well have preferred to have *no bill at all* rather than a bill containing an emergency health exception.

In addition, amici's legislative perspective includes a desire to protect the legislative process from possible judicial encroachment. If the Act as it is written is unconstitutional, as we think it is, then amici would stress that it should be the legislators, not the courts, who decide whether a new statute should be written and how to write its provisions in such a way as to make it both constitutional and politically acceptable to a majority of the State's elected representatives. This legislative perspective is one that amici uniquely possess; the parties are, of necessity, viewing this case from a different point of view.

SUMMARY OF ARGUMENT

For more than three decades, this Court has consistently held that laws restricting access to abortion are unconstitutional unless they contain a health exception to protect women's health and lives. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 879-80 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000). In direct contravention of this constitutional mandate, the New Hampshire Legislature chose to impose

[3] The vast majority of amici participated first-hand in the legislative process that resulted in the Act at issue in this case. Others are currently serving in the Legislature.

a major restriction – imposing a 48-hour delay after parental notification – without including an exception where a prompt abortion is necessary to protect a young woman's health. For this reason alone, the Act is unconstitutional.

Because the Act is unconstitutional, and because it would be inappropriate for this Court to rewrite the Act in order to "save" it, this Court should facially invalidate it. In prior decisions, both pre-*Casey* and post-*Casey*, this Court has facially invalidated statutes that the Court had held to be unconstitutional because they placed an undue burden on a woman's right to obtain an abortion.

The Court should certainly not try to "save" the statute by judicially crafting new statutory provisions that the New Hampshire Legislature did not see fit to include in the statute that it voted on. Writing and rewriting statutory language is emphatically the province of the legislative branch of government, in this case the *state* legislative branch; it is not the province of the judicial branch, especially the *federal* judiciary.

Finally, the Act's judicial bypass provision was not intended to supply the medical emergency exception. The bypass provision, by its terms, applies only to a minor who "elects" not to notify her parents, and says nothing about the teen who *wants* to notify her parents but for one of many reasons is unable to. Nor does it address the situation in which a minor needs an abortion in less than 48 hours to avoid serious health repercussions and has notified her parents, but the parents are unable promptly to "certify in writing that they have been notified."

ARGUMENT

I. THE STATE WAIVED THE ARGUMENT THAT IT WAS NOT REQUIRED TO INCLUDE AN EMERGENCY HEALTH EXCEPTION IN THE STATUTE.

The State did not argue, in the district or circuit courts, that it was not required by the Constitution to include an emergency health exception in the Act. Instead, the State contended, in those courts, that *it met that requirement* by means of other unrelated statutory provisions that had already been on the books. Having failed to preserve the argument the State is now raising – that the Act would be constitutional even with *no* emergency health exception – the State cannot now be heard in this Court to raise an argument it waived in the district and circuit courts.

This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *See City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (finding "considerable prudential objection" to doing so, even though there is no jurisdictional bar to reaching such questions). In *Kibbe*, the petitioner had failed to raise its objection in the *trial* court. Here, the State of New Hampshire failed to raise its present argument in *either* the district court *or* the court of appeals. This argument should not be considered by this Court where the State failed first to give the "lower courts" an opportunity to address the parties' contentions. *See Kibbe*, 480 U.S. at 259.

II. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S HOLDING THAT THE ACT IS UNCONSTITUTIONAL BECAUSE IT LACKS AN EMERGENCY HEALTH EXCEPTION.

As the Respondents' brief more fully explains, the circuit court correctly held the Act unconstitutional because it does not include an exception for emergency situations where the young woman's health will be endangered, if she cannot get a prompt abortion. *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 62 (1st Cir. 2004). The primacy of women's health has been a part of this Court's jurisprudence for more than three decades. The Court has required an emergency health exception to statutory abortion restrictions, including statutes imposing a waiting period or other delay before a woman may obtain an abortion (as well as outright prohibitions on a woman's right to an abortion).

For 32 years – from *Roe* to *Casey* to *Stenberg* – the *sine qua non* of validity for abortion regulations has been held to be an exception to protect the health of the woman. In *Roe* itself, the Court held that even post-viability bans must contain a health exception. *Roe*, 410 U.S. at 164-65. Indeed, this Court has explicitly held that the type of abortion restriction contained in the New Hampshire Act – a mandatory *delay* (48 hours after parental notification) before an abortion may be performed – must contain an exception for circumstances where a woman needs a prompt abortion to protect her health. *Casey*, 505 U.S. at 879-80, 886.

This Court held, in *Casey*, that Pennsylvania's parental involvement and waiting period restrictions would have been unconstitutional, if the statute *had not* contained an exception permitting an immediate abortion if

necessary to prevent significant health risks; the Court reasoned that "*the essential holding of Roe forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health.*" *Id.* at 880 (emphasis added). However, the Court found that, unlike the New Hampshire Act, the Pennsylvania law *did* include an exception for medical emergencies that was not limited to life-threatening situations. *Id.* at 879 (recognizing statutory exception for medical emergency "for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function"). Critical to this Court's conclusion was the fact that the court of appeals had construed Pennsylvania's medical emergency exception as "assur[ing] that compliance with [the] abortion regulations would not *in any way* pose a significant threat to the life *or health* of a woman." *Id.* at 879-80 (emphasis added). Because of this medical emergency exception, the Court found that the statute's waiting period did not place a substantial obstacle in the path of a woman seeking an abortion. *Id.* at 886. *See also Planned Parenthood v. Owens*, 287 F.3d 910, 927 (10th Cir. 2002) (holding a Colorado parental notification law "unconstitutional because it fail[ed] to provide a health exception as required by the Constitution of the United States"); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 203 (6th Cir. 1997) ("any abortion regulation that might delay an abortion must contain a valid medical emergency exception").

Applying these well-established constitutional standards, the circuit court properly concluded that the New Hampshire Act is fatally flawed. *Heed*, 390 F.3d at 60-62. Unlike the statute in *Casey*, the New Hampshire Act

contains *no exception* that would protect a young woman's health in situations where she is not facing imminent death but delaying her abortion would put her health at serious risk.[4] For this reason alone, the circuit court's decision must be affirmed.

In addition, the New Hampshire Act imposes a forty-eight-hour waiting period after parents have been notified. As this Court made clear in *Casey*, such a delay is unconstitutional, in the absence of an emergency health exception. *Casey*, 505 U.S. at 880, 886. If a waiting period of twenty-four hours is unconstitutional without an emergency health exception, *id.*, then the New Hampshire Act's forty-eight-hour waiting period surely requires an emergency health exception.

The requirement of an emergency health exception will be more fully discussed in the brief of the respondents, and has been explained in the First Circuit decision. Therefore, we will not elaborate on it here. Instead, we turn to the question of remedy: given that the New Hampshire statute fails to include a medical emergency

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[4] As the *undisputed evidence* makes clear, the lack of such an exception will cause minors to suffer serious and unnecessary injuries to their health. For example, some teenagers with preeclampsia – a condition that occurs most frequently in young women pregnant for the first time – risk substantial harm to their kidneys, liver, and vision if an abortion must be delayed to comply with the Act's requirements. Goldner Affid. ¶¶ 8-9, Joint App. 23-24. Similarly, delaying an abortion for a minor with premature rupture of membranes may cause significant and permanent harm to the young woman's health, including infertility, a lifetime of chronic pelvic pain, and an abdominal abscess. *Id.* ¶¶ 10-11, Joint App. 24-25; *see also id.* ¶¶ 7-15, Joint App. 23-26 (describing other conditions where a prompt abortion is needed to protect a woman's health from significant and permanent damage).

exception, and is therefore unconstitutional, what should the courts do about it?

III. THE CIRCUIT COURT CORRECTLY HELD THAT NEW HAMPSHIRE'S UNCONSTITUTIONAL STATUTE MUST BE *FACIALLY INVALIDATED*.

A. Facial Invalidation Has Been the Remedy in Prior Decisions, Both Pre-*Casey* and Post-*Casey*, Where a Statute Restricting Abortion Was Held Unconstitutional.

In a number of prior cases, both pre-*Casey* and post-*Casey*, this Court has facially invalidated statutes restricting access to an abortion, as the remedy for the restriction's unconstitutionality. *See, e.g.*, *Stenberg*, 530 U.S. at 929-30; *Thornburgh v. American Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 769-71 (1986), *overruled in part on other grounds, Planned Parenthood v. Casey*, 505 U.S. 833 (1992).[6]

Just last year, this Court "recognized the validity of facial attacks" in settings involving, *inter alia*, abortion (but rejecting facial attacks "outside these limited settings"). *Sabri v. United States*, 541 U.S. 600, ___, 124 S.Ct. 1941, 1948-49 (2004).

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[6] *See also Casey*, 505 U.S. at 895; *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 482 (1983); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 426 (1983) (*Akron I*), *overruled in part on other grounds, Casey*, 505 U.S. 833 (1992); *Colautti v. Franklin*, 439 U.S. 379, 401 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69, 74-78, 82-84 (1976); *Doe v. Bolton*, 410 U.S. 179, 201-02 (1973) (all facially invalidating abortion restrictions).

B. The Courts, Including This Court, Should Not Put Themselves in the Position of Rewriting Statutes, Even If They Would Do So In Order to "Save" a Statute's Constitutionality.

1. It Would Be Inappropriate for the Courts to Intrude on the Province of the Legislature

It is fundamentally the province of the legislative branch, not the judiciary, to write all of the provisions of any given statute. As this Court stated in a different context:

> Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 483 (1992).

What this Court said about Congress in *Cowart* is even more true of state legislatures such as New Hampshire's here.[6] "[I]t is not the function of a court 'to

[6] To say, as we do here, that this Court should refrain from any inclination to rewrite the New Hampshire parental notification act in order to "save" it, does not mean that the Court never has any role in interpreting statutes after their adoption by the legislative branch. However, it is one thing for a court to interpret an *ambiguous* provision by applying the principles of statutory construction. It is quite another thing, after finding a statute unconstitutional – because it includes *no provision* to protect a woman from serious health repercussions – for a court to *draft its own language* to insert in the statute in order to cure the constitutional defect.

hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State]." *Caban v. Mohammed*, 441 U.S. 380, 393 n.13, 394 (1979) (striking down a state statute as unconstitutional based on "'overbroad generalizations' in gender-based classifications").

Amici have, among them, many years of experience as legislators. They know all too well the truth of the old saw that "enacting legislation is like making sausage, and watching it happen is not for the squeamish." The legislative process is a constant give and take. Alliances are formed and then dissolved, new ones formed and then rearranged. Draft bills are amended – often many times – and, once approved by one legislative house, bills are frequently approved by the second house in a vastly different format. Committees of conference negotiate between the House and Senate versions, and sometimes come up with a bill that is altogether different from either of them. The conference committees might even negotiate approval of the Senate version of Bill A in exchange for the House version of Bill B, on an entirely different subject. In the end, many compromises and trade-offs are made before the final bill becomes law. It is impossible to predict, at the outset, how all the uncertainties will play out.

This "sausage factory" is not pretty. Yet it is an aspect of our democratic, three-branched government that is best left to the legislature. Courts acting in the abstract cannot and should not substitute their analysis of how a constitutional statute *might have been* crafted *if* the Legislature had collectively worked through their different interests and tried to produce such a result. This is why courts have refused to tread upon "the province of the Legislature" by

rewriting an unconstitutional law in order to "save" it. *See Caban*, 441 U.S. at 393 n.13.

This is as true in New Hampshire as it is in the federal courts.[7] Just last year, the New Hampshire Supreme Court refused to "supply a limiting construction" to a statute held unconstitutional; the court could not envision a construction that "would allow [the court] to limit the scope of the statute without *invading the province of the legislature*." *State v. Brobst*, 151 N.H. 420, 857 A.2d 1253 (2004) (emphasis added). Guarding against such an invasion has a long history in New Hampshire. In *Williams v. State*, 81 N.H. 341, 353, 125 A. 661, 667 (1924), *overruled in part on other grounds, Amoskeag Trust Co., et al. v. Trustees of Dartmouth College*, 89 N.H. 471, 200 A. 786 (1938), the Court rejected a graduated tax as unconstitutional, but then refused to judicially impose a flat tax at any particular rate because to do so "would be *an act of legislation not of construction*. The legislature intended to substitute a new system as a whole, and as all the provisions cannot be carried into effect and as it is impossible to tell what part the legislature would have adopted independently, the whole section is void." (Emphasis added.) *See also Opinion of the Justices*, 108 N.H. 268, 275, 233 A.2d 832, 836 (1967) (voiding "the whole amendment," where it was "impossible for [the Court] to determine whether the Legislature would have enacted any part of the amendment if the whole or a major part of it could not

[7] This Court is "bound to accept the interpretation of [New Hampshire's] law by the highest court of the State." *Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (quoting *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n*, 426 U.S. 482, 488 (1976)).

[because of constitutional prohibitions] be carried into effect").

"Courts have no right to redraft legislation to make it conform to an intention not fairly expressed therein." *Ahern v. Laconia Country Club*, 118 N.H. 623, 625, 392 A.2d 587, 588 (1978); *State v. Johnson*, 134 N.H. 570, 578, 595 A.2d 498, 503-04 (1991) (same). It is not for a reviewing court "to add terms to the statute that the legislature did not see fit to include." *Ahern*, 118 N.H. at 625, 393 A.2d at 588. The question "is not what the legislators ought to have done when they originally passed [a particular statute], or what they would have done had they thought of it." *Sigel v. Boston & Maine R.R.*, 107 N.H. 8, 23, 216 A.2d 794, 805 (1966).

In the instant case, there are many different ways that any particular provision – including a medical emergency exception – could be written. It is "impossible to tell" which of those possibilities the legislature would have chosen as its fallback position if it knew that the statute as enacted would be held unconstitutional. It is not appropriate for this Court to choose among those various possibilities and do the legislature's job for it. *See Williams*, 81 N.H. at 353, 125 A. at 667.

2. The Legislature that Passed the Act Might Well Have Refused to Pass a Parental Notification Act with Whatever Amendment this Court Might Write in an Effort to Render the Act Constitutional.

The courts' intrusion on the province of the Legislature would be especially inappropriate with respect to the particular legislative choice made by the New Hampshire

Legislature when it enacted the parental notification law. If the Legislature were faced with the choice of facial invalidation or reading in a medical emergency exception, there is significant doubt as to which choice the Legislature would have made. Indeed, there is reason to believe that the Legislature would have voted for no law at all rather than for one with a medical emergency exception.

A number of legislators – including the Act's key sponsors – made clear that they would have preferred to have *no law* rather than a law that contains a medical emergency exception in it. They strongly opposed inclusion of a medical emergency exception on the ground that they wanted to test the law, and in particular wanted this Court to adjudicate the issue of whether a medical emergency exception would be required in a parental notification statute.[8]

At the time they enacted the parental notification act, the New Hampshire Legislators were well aware of the thirty years of Supreme Court law on the subject of abortion. And the Legislators were well aware of – indeed some of the Act's sponsors were contemptuous of – this Court's decisions protecting maternal health. For example, Rep. Phyllis Woods, one of the lead sponsors of the Bill, stated

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[8] The amicus briefs supporting the state in this case have expressed the same view as many of the sponsors of the New Hampshire statute: they do not think a medical emergency exception should be a part of an abortion regulation law; they believe such exceptions are so broad as to reduce the effectiveness of the abortion regulation; and they desire to restrict abortions to the rare cases where the woman's very life is endangered. The amicus briefs thus support the argument that the New Hampshire legislators who voted to pass the parental notification act made a purposeful decision to enact a law that did *not* contain a medical emergency exception.

clearly that lawmakers *intentionally* left out a health exception. *See* New Hampshire Public Radio News, "Parental Notification Law Faces Challenge," Nov. 17, 2003, available at http://www.nhpr.org/node/5396/ (copy attached *infra* at App. 4). *See also* statement by Rep. Fran Wendelboe, quoted in the Portsmouth Herald, December 31, 2003, available online at http://www.seacoastonline.com/2003news/12312003/news/68017.htm (copy attached *infra* at App. 8) ("We didn't mistakenly forget to put in a health exception. We purposely crafted a bill without an exception.").[9] These sentiments pervaded the public discussion of New Hampshire's parental notification act.

The Legislators who supported passage of the Act knew very well how to draft language that would have provided an emergency health exception;[10] yet they chose not to include such language in the Act. *Compare Thornburgh*, 476 U.S. at 771 ("It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so.... It specifically provided a medical-emergency exception with respect to [several restrictions]," yet did not include one in the provision at issue. "We necessarily conclude that the

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[9] Many of the present amici participated in the debates on the Act, and expressed dismay at their colleagues' expression of such contempt for the rule of law and such insensitivity to the very real possibility that the absence of an emergency health exception could create serious health consequences for vulnerable young women.

[10] Indeed, in several prior years, bills had been introduced in the Legislature to require parental notification before minors could obtain an abortion, and each of those prior bills contained an exception where necessitated by a health emergency. *See, e.g.*, S.B. 442, 1998 Session (N.H. 1998); H.B. 1278, 2002 Session (N.H. 2002); H.B. 1380, 2002 Session (N.H. 2002).

legislature's failure to provide a medical-emergency exception in [the statute] was intentional.").

The Act passed the New Hampshire Legislature by a narrow margin in each house. The vote was so close that a change of one vote in the Senate and a handful of votes in the House would have made the difference between the present law and no law at all. In the face of doubt, the courts should steer a wide berth around any action that could be construed as doing the legislature's job for it, especially where a majority of the legislature might not support the statute as the court might rewrite it in order to render it constitutional. The federal courts certainly should not be in the business of writing a new state law and assuming that the legislature would have passed it in the form that the courts have rewritten it.

When a court is "not sure whether the legislature would have enacted" one provision of a statute "in the absence of all of the unconstitutional provisions," the court "must leave that question to the legislature," and *void the entire statute*. *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 531, 464 A.2d 288, 299 (1983); *Carson v. Maurer*, 120 N.H. 925, 946, 424 A.2d 825, 839 (1980) (same). Similarly, here, the Court cannot be "sure whether the legislature would have enacted" the Act if its language were rewritten by the Court in a way that would render it constitutional; therefore the Court "must leave that question to the legislature," and void the entire statute. *Heath*, 123 N.H. at 531, 464 A.2d at 299.

Accordingly, amici urge the Court to affirm the First Circuit's judgment facially invalidating the Act. If the legislature, at some later date, chooses to enact a new statute with different provisions, then the courts will have

an opportunity to decide whether that new statute is constitutional, according to the law as this Court has defined it. New Hampshire's Parental Notification Prior to Abortion Act should be facially invalidated.

IV. THE JUDICIAL BYPASS PROCEDURE WAS NOT INTENDED TO SUPPLY THE MEDICAL EMERGENCY EXCEPTION.

The Petitioner argues in her brief, at 20-23, that the judicial bypass procedure set forth in the Act "adequately protects the life and health of the mother. . . . " This argument was rejected by the district court:

> The Attorney General also argues that the judicial bypass provision of the Act would allow an abortion, without notification, to protect the health of a pregnant minor. Even with the provisions for expediting such proceedings, the judicial bypass process necessarily delays an abortion in a health emergency. Dr. Goldner states in his declaration, which is not opposed by the Attorney General, that certain medical conditions during pregnancy require immediate abortion to protect the health of the mother and that any delay would jeopardize her health. The Attorney General has not explained how the judicial bypass provision would address the need for an immediate abortion to protect the health of the mother, and the provision on its face is insufficient to meet such a need. Therefore, the judicial bypass process does not save the Act from the lack of a constitutionally required health exception.

Planned Parenthood of Northern New England v. Heed, 296 F. Supp. 2d 59, 66 (D.N.H. 2003). Petitioner's argument was also rejected by the court of appeals:

> Finally, the Attorney General argues that the Act's judicial bypass mechanism allows prompt authorization of a health-related abortion without notice. The Act provides that such proceedings "shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay," provides minors 24-hour, 7-day access to the courts, and provides for expedited appeal. RSA 132:26, II(b)-(c). However, the Act allows courts seven calendar days in which to rule on minors' petitions, and another seven calendar days on appeal. Delays of up to two weeks can therefore occur, during which time a minor's health may be adversely affected. Even when the courts act as expeditiously as possible, those minors who need an immediate abortion to protect their health are at risk. Due to this delay, the Act's bypass provision does not stand in for the constitutionally required health exception. *See Thornburgh*, 476 U.S. at 768-71, 106 S.Ct. 2169 (finding statute facially invalid for failing to provide health exception to delay caused by awaiting presence of second physician).

Heed, 390 F.3d at 62. The Petitioner's argument in this regard is no more persuasive before this Court.

The judicial bypass procedure is set forth in RSA 132:26, II. It burdens a pregnant minor who does not wish to notify her parents with the obligation to seek judicial authorization for an abortion. While requiring decisions on such requests to be reached "promptly and without delay," the statute provides no specific timeframe for medical

emergencies, which might require prompt medical action in order to avoid significant and permanent harm to the pregnant minor. *See supra* at 7, n.4. Instead, the judicial bypass provision only establishes a deadline for decision of seven (7) days from the filing of the petition (II(b)), and another seven (7) day period from the docketing of an appeal from the denial of a petition (II(c)). While the state judiciary will certainly attempt to act "promptly," statutory compliance means that, even if the pregnant minor acts immediately throughout, fourteen (14) days could pass in the judicial proceeding. Such a structure could not have been intended to supply a medical emergency exception.

In addition, although the Act purports to provide access to the courts "24 hours a day, 7 days a week," such access outside of normal hours during which trial courts are open is difficult at best, and often impossible. It may well be that law enforcement and sophisticated parties with significant resources may have the ability to access the justice system "after hours," but this would not be the reality for an individual petitioner inexperienced in legal matters and of limited means. Moreover, the Act provides no funding for the expedited procedure and appointed counsel right it creates, and there is nothing in the record to suggest that the New Hampshire state court system is able to respond to this additional responsibility as dictated by the Act. The New Hampshire legislature was assumedly aware of these issues, which further evidences the fact that the judicial bypass procedure was not intended to substitute for a medical emergency exception.

Finally, the language of the statute itself demonstrates its inapplicability to medical emergencies. As noted, the procedure contemplates the "pregnant minor elect[ing] not to allow notification of her parents," RSA 132:26, II, a concept bearing no relation to the existence of

a medical emergency for which the minor is willing to notify her parents, but they are unwilling, unable, or unavailable to provide the written certification of notice to allow the abortion to proceed immediately. *See* RSA 132:26, I(b). Likewise, the statute's language about "best interests" – requiring that a judge "determine whether the performance of an abortion upon [a pregnant minor] *without notification of her parent* . . . would be in her best interests" – again bears no relation to the case in which the minor *does* notify her parents but the parents are unable, unwilling, or unavailable to immediately provide the necessary certification. RSA 132:26, II (emphasis added). Again, it is clear that the judicial bypass procedure is intended to apply only to the circumstance of the pregnant minor *electing* not to notify her parents. It is equally clear that the bypass procedure was *not* intended to deal with medical emergencies, and that it fails to provide the constitutionally required mechanism for dealing with such emergencies.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the judgment of the First Circuit and to facially invalidate New Hampshire's Parental Notification Prior to Abortion Act.

Respectfully submitted,

RUSSELL F. HILLIARD
KENNETH J. BARNES

UPTON & HATFIELD, LLP
10 Centre Street, P.O. Box 1090
Concord, NH 03302-1090
(603) 224-7791
Attorneys for Amici Curiae

LIST OF AMICI CURIAE

Dennis Abbott
Peter Allen
Susan Almy
Gene Andersen
Michael Asselin
Jane Beaulieu
Bernard Benn
Peter Bergin
David Bickford
Elizabeth Blanchard
MaryAnn Blanchard
Ruth Bleyler
Candace Bouchard
Jennifer Brown
Julie Brown
Larry Brown
Donald Brueggemann
Peter Burling
Mark Carter
Kim Casey
Bill Chase
Claudia Chase
Jacalyn Cilley
Claire Clarke
Jane Clemons
John Cloutier
Mary Cooney
David Cote
Peter Cote
James Craig
Irene Creteau
Lou D'Allesandro
Caitlin Daniuk
John DeJoie
Betsi DeVries
Howard Dickinson
Cynthia Dokmo
Richard Drisko
Patricia Dunlap
Timothy Dunn
Daniel Eaton
Stephanie Eaton
Fran Egbers
Peter Espiefs
David Essex
Iris Estabrook
Brenda Ferland
Eileen Flockhart
Robert Foose
Joe Foster
Linda Foster
Sheila Francoeur
Peter Franklin
Barbara French
Martha Fuller Clark
Mary Gile
Ruth Ginsburg
Earle Goodwin
David Gottesman
Kenneth Gould
John Graham
Anne Grassie
Vincent Greco
Elizabeth Hager
Betty Hall
Christine Hamm
Lee Hammond
Laurie Harding
Suzanne Harvey
Maggie Hassan
Randolph Holden
Charlotte Houde-Quimby

Karen Hutchinson
Anne-Marie Irwin
Arthur Jillette
Nancy Johnson
Robert Johnson
Naida Kaen
Sandra Keans
David Kidder
William Knowles
Angeline Kopka
Neal Kurk
Sylvia Larsen
Bette Lasky
Priscilla Lockwood
Jim MacKay
Roy Maxfield
Martha McLeod
Patricia McMahon
Edgar Mears
D. Scott Merrick
Irene Messier
Joseph Miller
Alida Millham
Bonnie Mitchell
Marcia Moody
Gail Morrison
Lori Movsesian
Catherine Mulholland
Sharon Nordgren
Terie Norelli
Tim O'Connell
J. Lisbeth Olimpio
Jessie Osborne
Derek Owen
Laura Pantelakos
Christopher Pappas
Betsey Patten
Don Philbrick
James Phinizy
James Pilliod
Jacqueline Pitts
Frances Potter
James Powers
John Pratt
Stephen Prichard
Tara Reardon
Barbara Richardson
Carl Robertson
Eric Rochette
Michael Rollo
Lucinda Rosenwald
Emma Rous
Deanna Rush
Jim Ryan
Peter Schmidt
Christopher Serlin
Gilman Shattuck
Barbara Shaw
Kimberly Shaw
Steve Shurtleff
David Smith
Marjorie Smith
Clair Snyder
Hilda Sokol
Pete Solomon
Judith Spang
James Splaine
Joe Stone
Francis Sullivan
Katherine Taylor
Kathleen Taylor
Robert Theberge
Anna Tilton
Joy Tilton
Frank Tupper
Janet Wall

Mary Jane Wallner
Mary Beth Walz
Chuck Weed
Bob Williams
Charles Yeaton

NH Public Radio

PARENTAL NOTIFICATION LAW FACES CHALLENGE

Reported by **Dan Gorenstein**
on Monday, November 17, 2003.

[Picture Omitted In Printing]

Pro-choice advocates are challenging the state's new law that requires minors to notify parents before getting an abortion.

Earlier today/Yesterday they filed a long-expected suit in federal court.

New Hampshire Public Radio's Dan Gorenstein reports.

A rough transcript follows:

Abortion rights activists argue New Hampshire's version of the law is unconstitutional.

Nearly 30 states require some form of parental involvement in abortion cases.

But the plaintiffs say many of those states remove the requirement if the young woman's health is at risk.

Northern New England's Planned Parenthood Jennifer Frizzed says this state didn't include the same language.

Track 3

1:56 the law we challenge today dangerously interferes with doctors ability to preserve the health of patients, the law requires a 48 hr. delay, even when the delay would cause serious and irreparable harm to the young woman, including, infertility, seizures and kidney or liver damage.

The plaintiffs believe without a health exemption, the courts will strike down the law.

And have asked the court to block it from taking effect on January 1st.

Republican Representative Phyllis Woods can't think of a worse outcome.

Woods, one of the lead sponsors of the legislation, says lawmakers intentionally left out a health exception.

She says that provision would make for a totally useless law.

3:08 the health exception is so broadly defined that in most cases, it is construed to be emotional, or financial health, by virtue of being pregnant a woman's health is compromised . . . that are not serious reasons to terminate a pregnancy.

Citizens for Life executive director Roger Stenson expected a court challenges.

But he's optimistic.

He points to a US Supreme Court decision upholding a Minnesota law that didn't provide a health exception.

3:50 the proof of the pudding is in the eating. So I would recommend for anyone's consumption a reading fo [sic] the Supreme Court decision on the parental notice statue in Minnesota . . . that is in black and white, and it can not be obfuscated by wild execrations from abortion providers.

Plaintiffs, however, cite their own legal precedent.

A recent federal court in Colorado threw out that state's law because it failed to protect a woman's health.

Lead attorney for the New Hampshire Plaintiffs, the ACLU's Jennifer Dalven.

Track 4

:04 the SC has made it very clear for states, that you may pass a parental notice law for abortion, but you must have an exception to protect the health and life of young women, so you must have an exception that allows a doctor to proceed with an immediate abortion when in good faith in their medical judgment, they believe a delay will result in the harm of a young woman.

Harvard Professor of Health Policy and Law Michelle Mellow says there are two seemingly conflicting decisions because the court's considered two separate questions.

The Minnesota case, says the professor, focused on whether 48 hours was a reasonable time for a young woman to discuss having an abortion with her parents.

In the Colorado case, she says the analysis focused on whether a woman's health would be at risk over a 48 hour waiting period.

Mellow said, in light of the Supreme Court's ruling in the Minnesota case, there are two reasons for plaintiff optimism.

3:03 number one we have a slightly different membership on the court. And number two the papers in this case seems to have done a better job of fleshing out the medical issues associated with a waiting period.

After Colorado's parental notification law was nullified, the legislature passed a similar law that included the health provision.

When asked whether the same would happen in New Hampshire, a member of state Senate leadership demurred.

He said, with the legislature so evenly divided, it could go either way.

For NHPR News, I'm DG.

Seacoastonline [LOGO]
The Source for the Seacoast

10-11-2005

STATE WILL APPEAL RULING ON ABORTION

By Stephen Frothingham
Associated Press

CONCORD – The state plans to appeal a federal judge's ruling that struck down New Hampshire's law requiring parental notice before a minor could get an abortion, the state attorney general said Tuesday.

"It's an important issue that should be reviewed" by the 1st U.S. Circuit Court of Appeals in Boston, Attorney General Peter Heed said.

The law was to have taken effect today. On Monday, U.S. District Judge Joseph DiClerico in Concord said it was unconstitutional because it lacked an exception to protect the minor's health.

Gov. Craig Benson, a strong supporter of the law, said he backed Heed's decision.

"It gives us an opportunity to push this up to a higher court, where more judges will rule on this, not just one single judge," Benson said.

Conservative lawmakers had urged Benson to appeal the decision rather than weaken the law by adding a health exception.

"We didn't mistakenly forget to put in a health exception. We purposely crafted a bill without an exception," said Fran Wendelboe, R-New Hampton.

She said a health exception would be an "open door."

"It would pretty much mean you would have no parental notice at all. Because who makes the decision about what is a health exception? The abortionist, who is already 100 percent gung-ho to do an abortion," she said.

Benson said a health exception wouldn't necessarily weaken the law. "It depends on how it's written," he said.

Heed said the appeals court has never ruled on a parental notice law.

The law would have required abortion providers to notify at least one parent at least 48 hours before performing an abortion on a minor. The parent would not have had to approve the abortion.

Alternatively, the girl could have asked a judge for permission, which the judge was required to grant if the girl was mature enough or the abortion was in her best interest.

DiClerico was unimpressed with the state's argument that judges could approve abortions in emergencies.

A federal appeals court in Denver last year ruled that a similar Colorado law was unconstitutional because it provided no exceptions for health emergencies.

"The judge clearly has substantial precedent that supports his decision," Heed said. "But we believe there is precedent on our side."

He said he would file the notice of appeal before the Jan. 27 deadline.

The Legislature may still try to change the law. But the bill passed by very narrow margins last May and any proposed changes would likely fracture the unusual

alliances that helped it pass. The Legislature had defeated similar legislation in previous years.